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No. 91-1626

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEVEDORING SERVICES OF AMERICA, INC.,
formerly Seattle Stevedore Company,
a California Corporation,

Petitioner,

vs.

EDWARD M. EGGERT; JODI EGGERT, his wife;
and the marital community composed thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Master Contracting Stevedore Association of the Pacific Coast, Inc., is a trade association of 21 member firms, including petitioner, Stevedoring Services of America, engaged in providing contract stevedoring services in all the principal ports of California, Oregon, Washington, Alaska, and Hawaii.[1] The member firms provide substantially all of the

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[1] MCSA's members include the following:

Bellingham Stevedoring Co.
California Stevedore and Ballast
California United Terminals
Container Stevedoring Co., Inc.
Cooper Stevedoring Co., Inc.
Hawaii Stevedores
International Transportation Service, Inc.
Jones Washington Stevedoring Company
Jones Oregon Stevedoring Company
Maersk Pacific, Inc.
Marine Terminals Corporation
Marine Terminals Corporation (of LA)
Matson Terminals, Inc.
McCabe, Hamilton & Renny Company, Ltd.
Metropolitan Stevedoring Co.
Northern Stevedore & Handling Corporation
Pasha Maritime Services, Inc.
Stevedoring Services of America, Inc.
Trans Pacific Container Corp.
Westfall Stevedoring Company
Yusen Terminals, Ltd.

stevedoring and marine terminal services performed by private contractors for ocean-going vessels calling at ports in those states. MCSA Members employ a work force of approximately 10,000 longshoremen and clerks, all of whom are members of the International Longshoreman's and Warehousemen's Union.

MCSA members have a vital financial interest in the subject matter of this petition. Each year they and their insurance carriers pay millions of dollars in longshore benefits pursuant to awards that are procured through fraud or misrepresentation or pursuant to awards that are subsequently either vacated or substantially reduced on appeal.

To the extent employers and insurers cannot recoup these compensation payments through offsets against future payment obligations, claimants are unjustly (and sometimes fraudulently) enriched. This, in turn, increases the liability and insurance costs of MCSA members. Recoupment, as sought by petitioner SSA

and enforced by the district court, will prevent such unjust enrichment and reduce employers' liability.

SUMMARY OF ARGUMENT

This case raises issues of overriding national importance: The Ninth Circuit's holding substantially abrogates employers' rights of appeal under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and effectively moots thousands of pending LHWCA appeals. That holding,[2] unless reversed, will substantially increase the cost of doing business in every port, and along every navigable waterway, in the United States.

Under the Ninth Circuit's holding, an employer's exclusive recoupment remedy

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[2] The Fifth Circuit, applying an analysis similar to the Ninth Circuit's, very recently reached the same result. See Ceres Gulf v. Cooper, No. 91-2097, 1992 U.S. App. LEXIS 5571 (March 27, 1992).

under the LHWCA is through offsets against inchoate future payment obligations; where there is no future obligation, there is no recoupment. Thus, even if an employer ultimately succeeds in reversing or vacating a compensation award, there can be no recoupment where that award has been fully paid during the pendency of the appeal.

This analysis ignores three "working realities" of longshore litigation: (1) Stays pending appeal under the LHWCA are practically impossible to obtain. (2) Consequently, employers must continue to pay benefits pursuant to adverse awards even as they appeal those awards. (3) Because of administrative and judicial backlog, compensation is often fully paid before an appeal is concluded.

Thus, if the Ninth Circuit is correct, an employer's statutory right of appeal (33 U.S.C. § 921) is often meaningless. Reversal, even upon a determination that a claimant fraudulently secured benefits, yields no substantive

relief. Appeals in such cases can result in nothing more than advisory opinions.

The Ninth Circuit's view of the LHWCA and associated remedies produces two additional important and inequitable results:

(1) Any recovery of longshore benefits from unjustly enriched claimants is limited to cases in which claimants have a continuing (if reduced) future entitlement to benefits. Thus, only those claimants who are so severely disabled that they are entitled to ongoing benefits are required to disgorge overpayments--while those who have received full compensation (and often have returned to work) by the time the overpayment is adjudicated escape any repayment obligation.

(2) Claimants who have engaged in misconduct in obtaining benefits are entitled to retain those monies--so long as there is no ongoing, future payment obligation against which an offset can be made. Thus, no matter how egregious a

claimant's misconduct, if he or she has been completely (albeit wrongfully) compensated, the employer has no remedy. This is a license for fraud.

Nothing in the LHWCA's language, legislative history, or underlying policies requires these anomalous results.

STATEMENT OF THE CASE

Respondent Edward Eggert obtained an award of longshore compensation benefits from his employer, Stevedoring Services of America ("SSA"). In obtaining this award, Mr. Eggert lied and made various misrepresentations.

SSA subsequently appealed the administrative law judge's compensation award to the Benefits Review Board. However, under existing law, SSA could not obtain a stay of payment of compensation pending the administrative appeal. The Benefits Review Board ultimately vacated the administrative law judge's

compensation order and remanded for a new hearing.

Upon remand, the administrative law judge determined that Mr. Eggert had, in fact, engaged in a pattern of lies and misrepresentations. Consequently, while Mr. Eggert had received $101,003.32 in total compensation payments, the administrative law judge concluded that Mr. Eggert was, in fact, entitled only to temporary disability benefits in the amount of $4,351.77.

SSA subsequently filed suit against Mr. Eggert in the United States District Court for the Western District of Washington, seeking to recoup the amount of compensation ($96,651.55), which Mr. Eggert had wrongfully obtained. SSA invoked an implied right of reimbursement under the LHWCA and further asserted pendant state claims for unjust enrichment, conversion, and fraud.

Upon cross-motions for partial summary judgment, the district court entered judgment for SSA, holding:

(1) the district court had federal question jurisdiction under 28 U.S.C. § 1331 because the gravamen of the action was one to enforce an administrative order under the LHWCA; and (2) under the circumstances of this case, where Eggert would otherwise reap "an unconscionable windfall," the LHWCA permitted an implied right of recoupment.

The Ninth Circuit reversed, holding that the district court lacked federal subject matter jurisdiction. The court of appeals concluded: (1) the LHWCA's express provision for recoupment through offsets against future compensation payments (33 U.S.C. § 914(j)) is exclusive; (2) the LHWCA does not permit an implied right of recoupment except as expressly provided in § 914(j); and (3) consequently, the district court lacked "federal question" jurisdiction to adjudicate SSA's claims. See 953 F.2d at 555-57.

In addition, in dictum, the court of appeals seriously questioned the

availability of recoupment remedies under state law. See 953 F.2d at 558, n.7 ("Although the question is not before us, it appears likely that Congress has expressed its intent to preempt state common law claims by employers against claimants for repayment of alleged overpayments of disability compensation.") (original emphasis).

REASONS FOR GRANTING WRIT

A. The Ninth Circuit's Holding Substantially Abrogates Employers' Rights of Appeal Under the LHWCA.

Each year, MCSA member employers pay millions of dollars of benefits pursuant to awards of compensation for scheduled disabilities under the LHWCA, 33 U.S.C. § 908(c)(1)-(20).[3]

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[3] Cf. Annual Report on Administration of The Act During Fiscal Year 1990 (U.S. Dept. of Labor 1991) at 23 (noting that maritime employers and their insurance carriers paid a total of $417,697,000 in

While member employers appeal many of these awards, benefits must be paid immediately (see 33 U.S.C. § 914(f)) and without any realistic possibility of a stay of payment pending appeal. See 33 U.S.C. § 921(b)(3) (prohibiting stays of payment of longshore compensation pending appeal "unless irreparable injury would otherwise ensue to the employer or carrier").[4]

Because of the peculiar "lump sum" aspect of scheduled compensation awards, such awards are almost invariably fully paid within three or four years. See 33 U.S.C. § 908(c)(1)-(20). Conversely,

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LHWCA benefits in 1989).

[4] Accord Edwards v. Director, OWCP, 932 F.2d 1325, 1329 (9th Cir. 1991); Rivere v. Offshore Painting Contractors, 872 F.2d 1187, 1191 (5th Cir. 1989) ("Irreparable injury is demonstrated only when the compensation award may be too heavy for the employer or insurer to pay without practically taking all his property or rendering him incapable of carrying on his business. . . .").

because of administrative and judicial backlog, employers' appeals, including judicial review by the courts of appeals, are rarely concluded in less than four years.

The arithmetic is obvious: Scheduled awards are almost always fully paid before appeals from such awards are finally adjudicated.

If the Ninth Circuit is correct, these appeals are pointless. Even if an employer ultimately prevails upon appeal, the employer has no remedy. Moneys paid out pursuant to improper awards cannot be recovered.

In the Ninth Circuit's view, thousands of pending LHWCA appeals are (or will soon be) non-justiciable.

This result cannot be squared with an employer's statutory right of appeal under the LHWCA. See 33 U.S.C. § 921. Nor can it be squared with fundamental due process. By barring post-appeal recoupment, the Ninth Circuit has effectively sanctioned administrative

takings (through LHWCA compensation awards) without meaningful judicial review.

The Ninth Circuit's holding has profound implications for pending and future LHWCA appeals. Review should be allowed.

B. **The Ninth Circuit's Holding, Which Permits Claimants to Retain Wrongfully/Fraudulently Obtained Benefits, Is Contrary to the LHWCA's Remedial Purposes.**

These are hard times on the waterfront. Because the future is uncertain and temptation is great, fraud in obtaining longshore compensation is pervasive and proliferating.

MCSA member stevedores live with this reality every day. And they pay for it--in spiraling workers' compensation premiums and self-insurance costs.

The Ninth Circuit's holding greatly exacerbates this problem: Because of that holding, dishonest employees now know they can "take the money and run." Even if

their fraud is ultimately discovered, their employers have no recourse.

This result, which inevitably flows from the Ninth Circuit's "exclusive" construction of LHWCA section 914(j), cannot be reconciled with the Longshore Act's fundamental equitable and remedial policies. The LHWCA is intended to promote fair compensation of injured workers--not to permit claimants, including those who have engaged in fraud, to retain benefits to which they are not entitled.

This Court should accept review to enforce the LHWCA's integrity by reversing this egregious result.

CONCLUSION

For the foregoing reasons, petitioner Master Contracting Stevedore Association of the Pacific Coast, Inc. supports petitioner's prayer that a writ of certiorari issue to review the decision

of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 4th day of May, 1992.

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